

BEFORE THE
Federal Communications Commission
WASHINGTON, D.C.

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

In the Matter of
Telephone Number Portability

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CC Docket No. 95-116
RM 8535

REPLY COMMENTS OF TIME WARNER COMMUNICATIONS HOLDINGS, INC.

Brian Conboy
Sue D. Blumenfeld
Thomas Jones

WILLKIE FARR & GALLAGHER
Three Lafayette Centre
1155 21st Street, N.W.
Washington, D.C. 20036
(202) 328-8000

**ATTORNEYS FOR TIME WARNER
COMMUNICATIONS HOLDINGS, INC.**

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Time Warner Communications Holdings, Inc. ("TWComm") hereby files its reply comments in response to the Further Notice of Proposed Rulemaking in the above-captioned proceeding.¹

I. INTRODUCTION AND SUMMARY

The Commission should establish cost recovery rules for long term number portability that give carriers the incentive to make and maintain the necessary upgrades as efficiently as possible and that limit the incumbent LECs' opportunities to act anticompetitively. Thus, the Commission should require all telecommunications carriers served by a regional Service Management System ("SMS") to pay for the costs of establishing and maintaining that system (the so-called category one costs) that cannot be reliably attributed to the activities of a particular carrier. Where attribution of category one costs can be reliably accomplished, the cost causers should bear them.

¹ See Telephone Number Portability, First Report and Order and Further Notice of Proposed Rulemaking, CC Docket No. 95-116, RM 8535 (released July 2, 1996) ("Further Notice").

Second, the Commission should require carriers to bear their carrier specific costs that are directly related to number portability (the category two costs) and that are only indirectly related to number portability (the category three costs). Such an approach eliminates the inefficient incentives created by a pooling arrangement.

Third, no special cost recovery rules need to be created for small LECs. They will be required to invest in number portability upgrades only where they face competition. In such cases, both the incumbent and the new entrant will face similar upgrade requirements, thus eliminating any potential competitive advantage for the entrant.

Finally, the Commission should not permit incumbent LECs to recover the costs of number portability from other carriers. Such an approach subverts the purpose of number portability by creating the incentive to load costs on bottleneck services. Rather, the incumbents should recover the costs from their end users in a manner consistent with the requirements of state rate regulatory schemes.

II. CATEGORY ONE COSTS SHOULD BE POOLED EXCEPT WHERE RELIABLY ATTRIBUTABLE TO PARTICULAR CARRIERS' ACTIVITIES.

As TWComm argued in its Comments, the best policy is generally to recover the category one costs from telecommunications carriers in the geographical area served by a regional SMS.² On the other hand, where it is possible to

² See Further Notice at ¶ 212.

reliably attribute the costs of uploading transactions or other SMS activities to a particular carrier, TWComm concurs with parties that argue that they should be recovered from the cost causer.³

As TWComm explained in its Comments,⁴ recovery on a regional basis, i.e. from the carriers served by a particular regional SMS, appears to be the most efficient approach to billing for category one costs. TWComm is concerned about the assertion made by CTIA that CMRS providers could not participate in such a scheme.⁵ However, given that CTIA has described the technical problems facing CMRS in fairly general terms, it is difficult to assess their argument. The Commission should therefore adopt a regional approach until it is demonstrated that such an approach is one in which it would be impossible for CMRS to participate.

The Commission should also order recovery based on the gross telecommunications revenues of a carrier minus payments made to other carriers.⁶ Gross revenues are the most accurate measure of market share. Despite arguments to the contrary,⁷ a recovery based on presubscribed lines would be unwieldy. Proponents of

³ See, e.g., Comments of MCI at 4; Comments of AT&T at 8-9. The Commission should nevertheless be mindful of the complexity of such an endeavor as described in TWComm's Comments. See Comments of TWComm at 10-12.

⁴ See id. at 8.

⁵ See Comments of CTIA at 2-3.

⁶ See Further Notice at ¶ 213.

⁷ See, e.g., Comments of SBC at 7-8.

this approach have not explained how they would account for the revenues of competitive access providers providing transport solely to the central office or tandem. Nor have they explained how they would account for revenue received from customers who switch carriers mid-way through the relevant time period for measuring market share. Moreover, in no case should the Commission adopt MCI's proposal which would apparently eliminate the long distance carriers' contribution by counting only lines subscribed to local service providers.⁸

The Commission should also reject the argument made by several incumbent LECs that payments to other carriers should not be subtracted from gross revenues for the purposes of determining contributions to the costs of number portability.⁹ The incumbents are concerned that this will unfairly benefit resellers and perhaps those purchasing unbundled elements as well. But the use of gross revenues is intended to reflect market share in the telecommunications market. The incumbents' argument boils down to an attempt to artificially reduce their market share. When a reseller or purchaser of unbundled elements includes the amount paid to an incumbent in the rate charged to consumers (whether end users or long distance carriers), it does not keep that revenue but passes it through to the incumbent,

⁸ See Comments of MCI at 6.

⁹ See, e.g., Comments of NYNEX at 7-9 (recommending gross retail revenues); Comments of Ameritech at 5-7 (same); Comments of Cincinnati Bell at 7-8; Comments of Bell Atlantic at 5.

another telecommunications carrier. These payments are not part of the new entrant's share of the telecommunications market, and, as Pacific Telesis ("PacTel") points out, including them as part of gross telecommunications revenues would result in double counting.¹⁰ They should not therefore be counted for the purposes of determining contributions to support number portability.

Finally, the Commission should reject PacTel's argument that incumbent LECs should be permitted to subtract payments received from other carriers for the purposes of determining gross revenues.¹¹ PacTel asserts that including such payments in assessments of gross revenues would result in double counting. But this should not be the case if, as TWComm recommends, carriers subtract payments made to other carriers from their gross revenues. In fact, eliminating both intercarrier payments and intercarrier receipts from assessments of gross telecommunications revenues would grossly distort any assessment of telecommunications market share.

III. CARRIERS SHOULD BEAR THEIR OWN CATEGORY TWO COSTS.

The commenting parties basically take one of two opposing positions on the recovery of category two costs.¹² On the one hand, TWComm and others argue that it is sound policy, and

¹⁰ See Affidavit of Richard D. Emmerson, attachment to Comments of PacTel, at 4.

¹¹ See Comments of PacTel at 6.

¹² See Further Notice at ¶¶ 221-225.

permissible under the statute, for the Commission to require carriers to bear their own category two costs.¹³ On the other hand, the incumbent LECs argue that fairness and the literal terms of the statute require that category two costs be pooled and recovered from the industry as a whole.¹⁴ With regard to each of the three issues raised in the debate, efficiency, fairness and the requirements of the statute, TWComm's position is sounder.

First, there is little question that requiring carriers to bear their own category two costs is the more efficient approach. Carriers that must pay for the full cost of their upgrades will have the incentive to make those upgrades in the most efficient manner possible. As past experience demonstrates, carriers have less incentive to control their costs under a pooling arrangement.¹⁵ Ironically, incumbent LECs complained about just this problem when they sought to eliminate pooling of the carrier common line charge.¹⁶

¹³ See, e.g., Comments of Teleport at 8-9; Comments of Frontier at 2; Comments of US WEST at 20 (proposing a cost recovery scheme that does not include pooling).

¹⁴ See, e.g., Comments of NYNEX at 10; Comments of BellSouth at 8; Comments of SBC at 10; Comments of Bell Atlantic at 4.

¹⁵ See Comments of Ameritech at 7 ("[a] mechanism involving pooling is administratively expensive and may incent and reward inefficiency"). For example, the Universal Service Fund has grown so quickly that the Commission has been forced to establish a cap on any further expansion. See 47 C.F.R. § 36.601(c).

¹⁶ See Petitions of Bell Atlantic and the New Jersey Board of Public Utilities to Amend Part 69 of the Commission's Rules

Specifically, pooling will give LECs with relatively high costs in a particular cost category the opportunity to pass some of those costs onto other carriers with relatively low costs in the same category.¹⁷ Pooling would also give carriers the opportunity to recover costs completely unrelated to number portability from other carriers.

Further, if the Commission requires carriers to bear their own category three costs, pooling category two costs would give carriers the opportunity to mischaracterize their category three network upgrades as category two costs.¹⁸ In fact, the incumbent LECs have already begun to attempt to do so. For example, the incumbents argue in their comments that adding switch processors,¹⁹ replacing or adding SS7 network links,²⁰ adding

Concerning Rules Concerning the Mandatory NECA Pool, RM-5205 (released May 21, 1986).

¹⁷ For example, this would be possible for any carrier with category two costs that were larger, as a percentage of the total category two costs of all carriers within a region, than the carrier's share of the telecommunications market (whether determined through gross revenues, presubscribed lines or some other measure) in that region.

¹⁸ Cincinnati Bell correctly states that "it may be ultimately easier to eliminate the [category three] cost category and simply assign a portion of the cost of network upgrades to [category two]." Comments of Cincinnati Bell at 3. In other words, it might be difficult for even the carriers, let alone regulators, to distinguish one category of costs from another.

¹⁹ See, e.g., Comments of BellSouth at 6; Affidavit of Gregory L. Theus, attachment to Comments of GTE, at 1 ("Theus Affidavit").

²⁰ See, e.g., Comments of BellSouth at 6; Theus Affidavit at 1; Comments of NYNEX at 4; Comments of PacTel at 9; Comments of USTA at 11.

capacity to Signal Transfer Points ("STPs"),²¹ adding switch memory and hardware,²² interoffice trunking upgrades,²³ SMS upgrades,²⁴ the creation of Service Control Points ("SCPs"),²⁵ and upgrades to the Global Title Translations ("GTTs")²⁶ should all be included in category two. While each of these is necessary for number portability, they are all upgrades that can be used for services other than number portability.

Thus, an expanded SS7 platform (SS7 links and STPs and even SMS's) can be used to provide revenue generating services such as 800, 888, Call Set-Up, and the Pizza Hut application. GTT upgrades are used for those services as well. SMS upgrades can be designed most efficiently to accommodate more than one functionality. Moreover, expansions in switching and trunking capacity are useful for more than one network functionality since these facilities are used to deliver calls on a carrier's network. Investments in these upgrades therefore properly belong in category three. The fact that the incumbents have tried to

²¹ See, e.g. Comments of PacTel at 9; Comments of USTA at 11; Theus Affidavit at 1; Comments of BellSouth at 6.

²² See, e.g. Theus Affidavit at 1; Comments of PacTel at 9.

²³ See, e.g. Comments of PacTel at 9; Comments of USTA at 11; Comments of NYNEX at 4.

²⁴ See, e.g. Theus Affidavit at 1; Comments of NYNEX at 4; Comments of USTA at 11.

²⁵ See, e.g. Comments of PacTel at 8; Comments of USTA at 11; Comments of NYNEX at 4; Theus Affidavit at 1.

²⁶ See, e.g. Comments of NYNEX at 4.

place them in category two demonstrates the incentive and opportunity for misallocation created by a pooling arrangement for direct carrier-specific costs.

The same can be said of the argument that carriers should be permitted to recover costs that result from investing in network upgrades before the carriers had planned to make them.²⁷ That a carrier had planned to invest in a particular upgrade demonstrates that the upgrade would support functionalities other than number portability. Such costs therefore properly belong in category three.

Second, the argument that it is somehow fairer to allow incumbents to pool these costs is not only misleading, but irrelevant.²⁸ The incumbents complain that, as existing carriers, their direct costs will be larger than the new entrants'. But many "new entrants," including TWComm, have already installed switches and SS7 networks that must now be upgraded to accommodate number portability. Where this is the case, TWComm will not enjoy any of the purported advantages of deploying the entire system all at once. Moreover, unlike incumbents that have established customer bases, new entrants need to gain customers before they will be able to recover the costs associated with number portability.

²⁷ See, e.g. Comments of BellSouth at 6; Comments of PacTel at 9.

²⁸ See, e.g., Comments of NYNEX at 6-7 (carriers should bear their "fair share" of costs); Comments of GTE at 5-6; Comments of PacTel at 10.

Further, it is difficult to see how it is more "fair" to allow incumbents to recover any extra costs of upgrading to number portability caused by the fact that they may have allowed their networks to become outdated. Nor is it fair to competitors, or more importantly end-users, to give the incumbents the incentive and the opportunity to recover investments in revenue generating services from the industry as a whole. To do so would retard competition and encourage inefficiency. It would also undermine the Commission's stated purpose in implementing the provisions of the 1996 Act, namely to promote competition rather than a particular category of competitor.²⁹ Indeed, it is the establishment of the preconditions of competition that the Commission should be most concerned with, rather than appeasing the LECs' somewhat overstated notion of fairness.

Finally, Section 251(e)(2) grants the Commission the discretion to require that carriers bear their own category two, as well as category three, costs. That provision requires that all telecommunications carriers bear the cost of number portability "on a competitively neutral basis as determined by the Commission."³⁰ Reviewing courts will grant the Commission a great deal of discretion in interpreting the meaning of this

²⁹ See Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, First Report and Order, CC Docket Nos. 96-98, 95-185 at ¶ 618 (released August 8, 1996).

³⁰ 47 U.S.C. § 251(e)(2).

provision since Congress has explicitly delegated that task to the administrative agency. Indeed, where Congress has explicitly delegated authority to an agency to prescribe rules and regulations to carry out a statutory provision, the agency's interpretation of the statute will be upheld unless arbitrary, capricious or manifestly contrary to the statute.³¹

It is not arbitrary, capricious or manifestly contrary to the terms of the statute to require all telecommunications carriers to support industry-wide costs and to require all

³¹ In Chevron, the Supreme Court held as follows:

[I]f the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute. . . . If Congress has explicitly left a gap for the agency to fill, there is an express delegation of authority to the agency to elucidate a specific provision of the statute by regulation. Such legislative regulations are given controlling weight unless they are arbitrary, capricious, or manifestly contrary to the statute.

Chevron U.S.A. v. Natural Resources Defense Council, 467 U.S. 837, 843-844 (1984) (emphasis added). See Fulani v. FCC, 49 F.3d 904, 909 (2d Cir. 1995) (where statute vests in the FCC authority to "prescribe appropriate rules and regulations to carry out the provisions of" the statute, such an "explicit delegation . . . in particular constitutes 'something more than the normal grant of authority permitting an agency to make ordinary rules and regulations'" (citation omitted); Ortiz v. Rental Management, 65 F.3d 335, 339 (3d Cir. 1995) ("[i]n the presence of . . . an explicit delegation of congressional authority, we must defer quite broadly to [Federal Reserve Board's] regulations") (citation omitted); NCTA v. FCC, 724 F.2d 176, 181-182 (D.C. Cir. 1983) ("if Congress entrusts a novel mission to an agency and specifies only grandly general guides for the agency's implementation of legislative policy, judicial review [under arbitrary and capricious standard] must be correspondingly relaxed") (citations omitted).

carriers that use the regional database to absorb their own number portability costs. Under this approach, "all telecommunications carriers" will pay for some of the costs of number portability.³² Moreover, all competitors in the local market (except perhaps pure resellers), as well as carriers that must communicate with the regional SMS, will incur their own number portability costs. Thus, all competitors will incur similar costs relative to their market share (unless they have deferred infrastructure upgrades that must in any case be made to support other revenue-generating services). Requiring carriers to bear their own costs, in turn, prevents anticompetitive misallocation of those costs. TWComm's approach is therefore "competitively neutral."

IV. CARRIERS SHOULD BEAR THEIR OWN CATEGORY THREE COSTS.

There is strong support in the comments for the view that carriers should bear their own category three costs.³³ As mentioned, the industry should not be required to pay for basic network upgrades that can be used for revenue-generating services. Moreover, permitting recovery of category three

³² It should be noted that, while the statute requires all telecommunications carriers to bear the costs of number portability, it does not state how much of the costs each carrier must bear. The statute only states that cost recovery must be competitively neutral.

³³ See, e.g., Comments of WinStar at 6-8; Comments of MFS at 4-5; Comments of AT&T at 17-18; Comments of Sprint at 9-10; Comments of Omnipoint at 4-7; Comments of Frontier at 2; Comments of Teleport at 7-8. This issue is discussed in the Further Notice at ¶¶ 226-229.

costs³⁴ would give carriers the incentive and the opportunity to overstate the number portability share of category three upgrades. Indeed, it would be virtually impossible for the Commission to determine the portion of each upgrade that is attributable to number portability. To avoid this problem, the Commission should require carriers to bear their own category three costs.

V. SPECIAL RULES SHOULD NOT BE ESTABLISHED FOR SMALL LECs.

Several parties have argued that the Commission should establish a bifurcated regulatory scheme for cost recovery in which small LECs would be permitted to recover the costs of many upgrades that other carriers would have to absorb. The Commission should reject these proposals as both unnecessary and potentially destructive.

First, USTA argues that the Commission should permit all carriers with less than 2% of the nation's access lines, "who incur costs solely to comply with the mandate to provide local number portability" to recover essentially all number portability costs, including infrastructure upgrades, from the industry as a whole.³⁵ USTA is concerned that these "small" LECs will be

³⁴ The arguments TWComm makes in the context of category three costs apply equally to LEC arguments that all costs that would not have been incurred "but for" number portability should be recovered from the industry as a whole. See Comments of GTE at 4-5; Comments of BellSouth at 6. The "but for" position is essentially an argument in support of recovering category three costs from the industry as a whole.

³⁵ See Comments of USTA at 2.

required to make these investments either because the N-1 call processing scenario will require that carriers adjacent to an area in which number portability has been deployed must query a number portability database³⁶ or because they provide service within one the top 100 MSAs.³⁷ These arguments are without foundation.

USTA is incorrect in asserting that all carriers whose service areas are adjacent to exchanges where number portability has been deployed will be required to make database queries under N-1. LRN, which has become the de facto industry standard, allows any carrier serving an area where competition does not exist to place such responsibilities on the donor switch in the area where number portability has been deployed. Thus, a LEC in an area where no competition exists will not be required to deploy number portability simply because it is adjacent to an area where competition does exist. Moreover, a LEC serving one area within a top 100 MSA in which there will be no competitive entry by the date set forth in Appendix A of the Further Notice should file a request for waiver of the implementation rules.³⁸

³⁶ See id. at 5-6.

³⁷ See id. 2-3.

³⁸ In the Further Notice, the Commission delegated to the Common Carrier Bureau the authority to waive or stay the number portability implementation deadlines for up to nine months. See Further Notice at ¶ 85. If a LEC requires a longer period, it can file a petition with the Commission for waiver under Section 1.3 of the Commission's rules. See 47 C.F.R. § 1.3.

The argument presented by NTCA and OPATSCO is similarly unconvincing. Those parties seem to argue that, even where a small LEC faces competition, it should be permitted to recover all of the costs associated with number portability, including category three network upgrades, from other carriers.³⁹ NTCA's and OPATSCO's rationale is that their members would be investing in the network upgrades solely to provide number portability. What the parties seem to ignore is that any carrier entering areas in which small LECs provide service would also have to invest in the full range of network upgrades necessary to provide number portability. It is therefore hard to see why the number portability rules would place the small incumbent LECs at a competitive disadvantage. Indeed, it is quite clear that in any area in which an incumbent, regardless of size or location, faces competition, it will need to invest in SS7 and AIN in order to compete.

VI. INCUMBENT LECS SHOULD NOT BE PERMITTED TO RECOVER NUMBER PORTABILITY COSTS FROM OTHER CARRIERS.

There is substantial opposition among the commenting parties to any regulatory scheme that would permit incumbent carriers to recover the costs of number portability from other carriers.⁴⁰ As several parties pointed out, this would only create the

³⁹ See Comments of NTCA and OPATSCO at 2-5.

⁴⁰ See, e.g., Comments of MCI at 12; Comments of Teleport at 12; Comments of AT&T at 10; Comments of MFS at 4. This issue is discussed in the Further Notice at ¶ 230.

opportunity for incumbents to raise their rivals' costs by loading costs onto bottleneck services.⁴¹

TWComm believes that the costs of number portability should be recovered from each carrier's end users in a manner that is consistent with the regulatory constraints imposed by the states.⁴² Finally, in no case should a subscriber be penalized for changing carriers by imposing even a nominal "PIC charge" as proposed by NYNEX.⁴³

⁴¹ Since the Commission's price cap regime regulates only incumbent LEC charges to other carriers, TWComm's opposition to permitting incumbent LECs to recover the costs of number portability from other carriers renders moot the issue of exogenous treatment under the Commission's price cap regime.

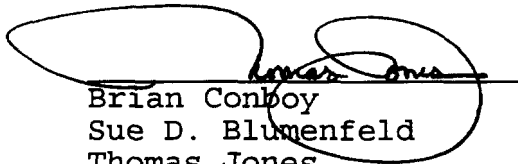
⁴² This does not mean, however, that the Commission should relinquish its jurisdiction over the manner in which carriers recover number portability costs, as several states have argued. See, e.g. Joint Comments of Colorado PUC and Colorado OCC at 10; Comments of the PUC of Ohio at 5-6. Widespread competition is much more likely to develop if the FCC ensures a basic level of regulatory uniformity across the country.

⁴³ See Comments of NYNEX at 13. This proposal seems solely designed to make customers less likely to change carriers. NYNEX has not identified any particular costs that such a charge would recover. Indeed, TWComm is not aware of any special costs that would go unrecovered as a result of an incumbent's subscriber changing carriers. This is because the incumbents generally include the cost of disconnecting service in the upfront, nonrecurring charge for initiating a service connection.

VII. CONCLUSION

The Commission should establish rules for the recovery of the costs of number portability that are consistent with these Reply Comments.

Respectfully submitted,



Brian Conboy
Sue D. Blumenfeld
Thomas Jones

WILLKIE FARR & GALLAGHER
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Washington, D.C. 20036
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